



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JUN 17 2003

**RETURN RECEIPT REQUESTED**

Susana Almanza, Executive Director  
People Organized in Defense of Earth and her Resources  
55 North IH 35, #205B  
Austin, Texas 78702  
(Certified Mail # 7003 0500 0003 8792 8141)

Re: EPA File No. 1R-96-R6 (PODER and MANIC)

Dear Ms. Almanza:

On December 2, 1998, EPA accepted an amended complaint filed by People Organized in Defense of Earth and Her Resources (PODER) and Montopolis Area Neighborhood Improvement Council (MANIC) alleging discriminatory conduct and effects in violation of Title VI and EPA's implementing regulations at 40 C.F.R. Part 7 as the result of TCEQ's use of "standard exemptions" in the permitting of the Tokyo Electron Texas, Inc. facility in Austin, Texas. Three separate allegations were accepted for investigation: a denial of relevant public information for use in a permitting challenge, a denial of public notice and participation through the use of permitting exemptions, and of cumulative impacts from the use of standard exemptions.

This letter and the accompanying Final Investigation Report constitute OCR's finding under Title VI and 40 C.F.R. Part 7, including the terms of an agreement under which TCEQ has agreed to undertake certain actions in the future, and OCR's dismissal of this Title VI complaint. OCR's findings, and the legal and factual bases for the findings, on each of the allegations are set forth in detail in the Investigation Report, which is incorporated herein by reference.

**Legal Background for Complaint.** Title VI prohibits discrimination on the basis of race, color, or national origin under programs or activities receiving federal financial assistance. EPA has adopted regulations to implement Title VI. 40 C.F.R. Part 7. EPA's regulations prohibit intentional discrimination and discriminatory effects that occur in the administration of programs or activities receiving EPA funds. Facially neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations, unless the recipient can provide justification and there are no less discriminatory alternatives. TCEQ (and its predecessor agencies) is a recipient of EPA financial assistance and is therefore subject to the requirements of Title VI and EPA's implementing regulations.



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**The Title VI Complaint.** The complaint concerned an allegation that TNRCC (TCEQ's predecessor) violated Title VI and EPA's implementing regulations on the basis that the Commission (1) denied residents living near the Tokyo Electron facility outside Austin of the opportunity for meaningful public participation by withholding public information from the permitting record, as a result of TCEQ's practice of approving contested permits prior to the resolution of appeals to the Attorney General for information withheld as confidential, (2) denied the opportunity for a full public permitting process and was alleged to result in cumulative impacts through the use of "standard exemptions" (a system of exemptions for *de minimis* facility emissions), and (3) use of "standard exemptions" results in cumulative impacts.

**Summary of Decision.** The results of the investigation indicated the following:

*Denial of Information:* The evidence indicated that no public information was withheld. Following completion of the appeal under the Texas Open Records law (the State's Freedom of Information Act equivalent), the information sought was determined to be a confidential trade secret and not public information. TCEQ has since changed its permitting procedures to suspend the permit process (*i.e.*, not further process or issue a permit) until an appeal for information under the Texas Open Records law is completed. The evidence also showed that permit was never approved, and the application was withdrawn by the facility.

*Denial of Process:* Following withdrawal of the permit application, the facility operated under a "standard exemption," which is an exemption from the permitting and notice requirements for facilities that emit *de minimis* levels of emissions, and there is no evidence that the facility did not qualify for the exemption (*i.e.*, no process to which residents were entitled was denied). Since the time that the complaint was filed (1996), the system of "standard exemptions" has been replaced by a new permitting system ("permits-by-rule"), with notice provisions and reduced procedural requirements (rather than a complete exemption from notice and permitting) that did not exist under the prior system, and lower emission levels to qualify for the streamlined permitting process. In addition, the facility in question has since been permitted using full public notice and comment procedures.

Also relevant to this allegation is the agreement entered into with TCEQ as part this investigation, under which TCEQ has committed to review and evaluate the adequacy of public notice and impacts from TCEQ permitted facilities, specifically to include permits-by-rule.

*Cumulative Impacts from "Standard Exemptions":* *De minimis* emission levels for standard exemption were set at levels below regulatory thresholds of concern, and are unlikely to result in an impact, alone or in combination with emissions from other sources. As noted above, the system complained of has since been replaced by a new system with reduced notice and permitting requirements, and applicable emission levels for these reduced requirements have also been revised downward (*i.e.*, made more stringent).

Also relevant to this allegation is the new authority provided by the Texas legislature in

2001 directing TCEQ to take cumulative impacts into account. In addition, by agreement entered into as part of this investigation, TCEQ has committed to work jointly with EPA Region VI in the area of cumulative impacts.

**Background.** Since 1994, a number of complaints, including that filed by PODER, have been filed with EPA's Office of Civil Rights alleging various violations of Title VI of the Civil Rights Act of 1964 as amended, 42 U.S.C. §§ 2000d *et seq.*, and EPA's regulations at 40 C.F.R. Part 7 by the Texas Commission on Environmental Quality's predecessor agencies – the Texas Natural Resource Conservation Commission, the Texas Air Control Board and the Texas Water Commission – in the administration of its environmental permitting and public participation program. Several of these complaints raised common issues or concerns, such as a failure or refusal to take into account the “cumulative” or “additive” impact on a surrounding community of emissions from the facility being permitted in conjunction with emissions from other facilities, and others raised a variety of issues regarding the adequacy of the public notice, education or outreach efforts to meaningfully inform potentially affected residents of proposed actions, or of the permitting process to address concerns raised by members of the public. In light of the range of common issues raised by the various complaints regarding TCEQ's program, OCR's investigation focused both on the individual matters complained of, as well as a more general review of TCEQ's public participation program and practices

**The Title VI Complaints.** The consolidated investigation covered nine separate allegations raised in six individual complaints: No. 2R-94-R6 (b) (6) Personal Privacy, No. 3R-94-R6 (Garden Valley Neighborhood Association), No. 5R-94-R6 (Mothers Organized to Stop Environmental Sins), No. 2R-95-R6 (People Against Contaminated Environments – Corpus Christi), No. 1R-96-R6 (People Organized in Defense of Earth and Her Resources), and No. 1R-00-R6 (People Against Contaminated Environments – Beaumont). By topic, the allegations raised concerned a failure of the permitting process to take *cumulative impacts* into account in permitting (b) (6) Personal Privacy, Garden Valley, PACE – Corpus Christi, and PODER); a failure to conduct *public education and outreach* or to *inform the public of hazards* or otherwise assist and enable meaningful participation in the permitting process (PACE – Corpus Christi); a *denial of public process* (PODER, PACE – Beaumont); a *denial of access to public information* for use by public in permitting (PODER); and a *failure to use evidence of violations* provided by the public in enforcement. (MOSES).

**The Title VI Investigation.** The investigation covered both the specific allegations made in the complaints, as well as a more general review of TCEQ's permitting and public participation processes. The factual basis for each of the individual allegations was investigated, and the more general review focused on the changes and modifications to TCEQ's permitting and public participation processes since 1994 (when the first of the complaints was accepted for investigation). In particular, the investigation looked for changes that had the effect of increasing, enhancing or otherwise assisting citizens and neighborhood groups to participate in the regulatory and permitting process; that enable TCEQ to better consider and respond to citizens' concerns; and that give greater attention to the environmental and human health

conditions in affected communities. In addition to a wide-ranging research and review of laws, rules and regulations, and TCEQ policies governing permitting and public participation activities, and an analysis of position statements and other evidence related to the specific complaints, EPA conducted numerous interviews of members of the public who have participated in or experience with TCEQ programs, TCEQ staff and management, as well as EPA Region VI staff and management familiar with TCEQ's conduct of public meetings on permits.

**Overall Findings.** Because the investigation covered a large number of complaints and allegations, and included a general review of TCEQ's permitting and public participation program, there are a number of specific findings. In addition, findings in some of the individual complaints covered by this investigation are affected by the outcome of prior investigations of other (non-public participation) allegations raised in these complaints. For example, the evidence did not support the claim in the Garden Valley Neighborhood Association complaint that residents there were subjected to adverse health impacts in the permitting of a particular facility,<sup>1</sup> indicating that the separate allegation covered by this investigation that TCEQ's failure to take "cumulative impacts" into account in facility permitting likewise did not result in adverse health impacts. Where relevant, the results of other investigations are discussed in the accompanying Investigation Report.

The Investigation concluded that many of the individual allegations have since been addressed, in whole or in part, by changes and enhancements to TCEQ's program that were adopted and implemented subsequent to the time that the complaints were filed. Thus, even if the allegations were true at the time, corrective measures have since been taken by TCEQ to address the matter that gave rise to the allegation. The available evidence in some other cases did not tend to support a finding of a violation of Title VI (as noted above with respect to the Garden Valley complaint), although subsequently-implemented changes to the program would have addressed the concern, either in whole or in part. In addition, TCEQ has entered into an agreement by which it has committed to undertake a number of actions in the future that are relevant to several of the allegations covered by this Investigation. However, the Investigation also indicated that even though TCEQ has formally modified substantial parts of its permitting and public participation program, the delivery of the program "in the field" is at times uneven and may require attention in the future to ensure its effectiveness. TCEQ will be taking steps to address this concern, as part of the written agreement.

**Conclusion.** As a result of the investigation of the allegations in this matter, and based upon review of the materials submitted and information gathered, and in consideration of the terms of the voluntary agreement for future action by TCEQ, as well as controlling legal authority, EPA has not found a violation of Title VI or EPA's implementing regulations. Accordingly, EPA is dismissing the complaint (as stated in Section VII of the accompanying Investigation Report) as of the date of this letter, and conditioned upon the completion and

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<sup>1</sup> See U.S. EPA Office of Civil Rights, Investigative Report for Title VI Complaint File No. 3R-94-R6 (Dec. 9, 2002).

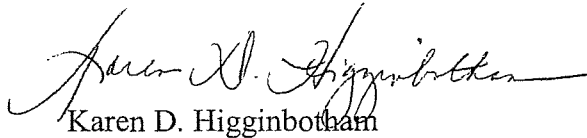
implementation of the commitments that TCEQ has agreed in writing to undertake.

Title VI provides all persons the right to file complaints against recipients of federal financial assistance. No one may intimidate, threaten, coerce, or engage in other discriminatory conduct against any individual or group because of action taken or participation in any action to secure rights protected under Title VI. 40 C.F.R. §7.100.

Under the Freedom of Information Act, 5 U.S.C. § 552, EPA may be required to release this document, the Final Investigation Report, and related correspondence, documents, and records, upon request. In the event of such a request, EPA will seek to protect, to the extent provided by law, any personal information, which, if released, could constitute an unwarranted invasion of the privacy of any individual.

In closing, I would like to thank and acknowledge the assistance of the representatives of the citizens groups and others who were part of the investigation, complainants, and the staff of TCEQ's Office of Public Assistance for being cooperative and helpful during this investigation. If you have any questions or would like to discuss these recommendations further, please feel free to contact John Fogarty of EPA's Title VI Task Force at 202-564-8865.

Sincerely,



Karen D. Higginbotham  
Director  
Office of Civil Rights

Enclosures

cc: Steve Pressman, Associate General Counsel (Acting)  
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